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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/897,823	06/29/2001	Gregory Ashton	8618	9706

27752 7590 02/24/2003

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EXAMINER

FLYNN, AMANDA R

ART UNIT

PAPER NUMBER

3751

DATE MAILED: 02/24/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/897,823

Applicant(s)

ASHTON ET AL.

Examiner

Amanda R. Flynn

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 18 December 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-38 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-38 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 18 December 2002 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

Response to Arguments

1. Applicant's arguments with respect to claims 1-38 have been considered but are moot in view of the new ground(s) of rejection.

Double Patenting

2. Claims 23-38 of this application conflict with claims 1-16 of Application No. 10/179,696. 37 CFR 1.78(b) provides that when two or more applications filed by the same applicant contain conflicting claims, elimination of such claims from all but one application may be required in the absence of good and sufficient reason for their retention during pendency in more than one application. Applicant is required to either cancel the conflicting claims from all but one application or maintain a clear line of demarcation between the applications. See MPEP § 822.

3. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states, "Whoever invents or discovers any new and useful process ... may obtain a patent therefor..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

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4. Claims 23-38 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1-16 of copending Application No. 10/179,696. This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 102

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

6. Claims 1-3, 8-10, 14, 16-17 and 20 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over U.S. Patent Number 4,690,681 to Haunschild et al.

Haunschild et al. disclose a pre-closed absorbent article, comprising front and back waist regions, a crotch region, front, back and side edges which define leg openings, leg opening margins, longitudinal and lateral centerlines, and top and back sheets with an absorbent core between the two, as seen in Figure 1. Haunschild et al. state that the article is intended to be worn by women during their menstrual cycles, which would result in the force of a woman's weight being transmitted against the sides of the article, inherently resulting in a lateral spreading force of at least 5 kg being subjected to the distal points of the leg openings. Haunschild et al. further disclose that the outer thigh portions of the leg openings contain elastic that travels through the leg openings. Haunschild et al. state that the unitary margin and cuff of the leg opening has an elastic extensibility of 35-100% (col. 3, lines 58-61) at its outer thigh area. As seen in Figure 1, a portion of the leg opening and cuff is curved. Additionally, Haunschild et al. disclose that the leg

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cuff is differentially extensible. Haunschild et al. disclose that the outer thigh portion has a first elastic extensibility of 35-100%, while the inner thigh portion of the leg cuff has a second elastic extensibility of 5-25% (col. 3, lines 55-61). Haunschild et al. disclose that the crotch region of the absorbent article has a width of less than 30% of the overall width of the diaper (col. 4, lines 18-19, 60-61).

In the alternative, due to the fact that there is no known criticality of the 5kg lateral spreading force, it appears that the absorbent article of Haunschild et al. would operate effectively and maintain an elastic extensibility of at least 60%, when subjected to a lateral spreading force of both more than and less than 5kg. Therefore, it would have been obvious to one skilled in the art at the time the invention was made to have provided the article as disclosed by Haunschild et al., wherein the extensibility of the leg cuff is between 35 and 100% when subjected to a spreading force of 5 kg, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable values or ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233.

Claim Rejections - 35 USC § 103

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. Claims 4-6, 15 and 21-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Haunschild et al. in view of U.S. Patent Number 5,797,824 to Tracy.

Haunschild et al. disclose the previously described absorbent article, having leg openings with a unitary leg cuff and margin. Haunschild et al. do not specify that the leg cuff is a discrete structure, or how the leg cuff is formed in relation to the rest of the article.

Tracy discloses an absorbent article comprising leg openings (14), to which straight discrete leg cuffs (64, 66) are affixed. The leg cuffs are affixed to the leg openings and wrap over its side edges, as shown in Figure 3, such that a free edge of the cuff is disposed adjacent the inner surface (16b) of the absorbent article and a portion of the cuff is in continuous alignment with the back sheet (16b). As seen in Figure 1, the ends of the leg cuff join at the uppermost point of the leg opening to encircle the leg opening.

It would have been obvious to one skilled in the art at the time the invention was made to have provided the absorbent article as disclosed by Haunschild et al., with the discrete leg cuff structure as taught by Tracy, due to the increased ease of manufacturing the article as multiple discrete elements.

9. Claims 7, 23, 27, 31 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Haunschild et al. in view of PCT Publication WO 99/60971 to Ashton et al.

Haunschild et al. disclose the previously described absorbent article having outer leg cuffs, but do not specify that the cuffs comprise a laminate.

Ashton et al. disclose an absorbent article and teach that many components of absorbent articles are generally made with a laminate, to improve resistance to leakage and allow for increased stretching during movement.

It would have been obvious to one skilled in the art at the time the invention was made to have provided the disclosed absorbent article of Haunschild et al., with a laminate leg cuff as

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taught by Ashton et al., to improve resistance to leakage and allow for increased stretching during movement.

10. Claims 11-12 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Haunschild et al.

Haunschild et al. disclose an absorbent article as previously described, having unitary leg cuffs and margins, which comprise two portions of differing elastic extensibility. Haunschild et al. do not specify that a third portion having a third elastic extensibility exists.

It would have been an obvious matter of design choice to substitute the disclosed two portions of differing elastic extensibility for three portions, in order to improve the ability of the absorbent article to stretch and conform to the wearer. Therefore, it would have been obvious to one of skilled in the art at the time the invention was made to make the disclosed absorbent article of Haunschild et al. with three portions of differing elastic extensibility to improve the ability of the diaper to stretch and conform to wearers of various sizes, due to the fact that mere duplication of the essential working parts of a device involves only routine skill in the art.

11. Claims 13 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Haunschild et al.

Haunschild et al. disclose an absorbent article as previously described, having two leg openings. Haunschild et al. do not specify the orientation angle of the leg openings.

It would have been obvious to one skilled in the art at the time the invention was made to have provided the leg openings with an orientation angle of 30 degrees, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F. 2d 272, 205 USPQ 215 (CCPA 1980).

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12. Claims 24-26, 28-30, 32-34 and 36-38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Haunschild et al. in view of Ashton et al. and in view of Tracy.

Haunschild et al. in view of Ashton et al. discloses the previously described absorbent article (paragraph 9). Haunschild et al. do not specify that the leg cuff is a discrete structure, or how the leg cuff is formed in relation to the rest of the article.

Tracy discloses an absorbent article comprising leg openings (14), to which discrete leg cuffs (64, 66) are affixed. The leg cuffs are affixed to the leg openings and wrap over its side edges, as shown in Figure 3, such that a free edge of the cuff is disposed adjacent the inner surface (16b) of the absorbent article and a portion of the cuff is in continuous alignment with the back sheet (16b).

It would have been obvious to one skilled in the art at the time the invention was made to have provided the absorbent article as disclosed by Haunschild et al. in view of Ashton et al., with leg cuffs having a free edge disposed adjacent the inner surface of the absorbent article and a portion of the cuff in continuous alignment with the back sheet, to improve ease of manufacture of the article.

Conclusion


13. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Amanda R. Flynn whose telephone number is 703-306-4056. The examiner can normally be reached on Monday-Thursday, 8:30 - 6:00 and alternate Fridays.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gregory L. Huson can be reached on 703-308-2580. The fax phone numbers for the


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organization where this application or proceeding is assigned are 703-872-9302 for regular communications and 703-872-9303 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1113.


Amanda R. Flynn
Examiner
Art Unit 3751


arf
February 21, 2003


DAVID J. WALCZAK
PRIMARY EXAMINER